HAS THE UNITED STATES REPUDIATED INTERNATIONAL ARBITRATION?

BY PHILIP WALTER HENRY.

WE hear a great deal in these days about the advent of international arbitration, which will cure all difficulties between nations, and even cause the abolition of war. Our delegates at The Hague were so throroughly imbued with the righteousness of decisions given through international arbitration that they were reported as having advocated the use of force in compelling nations to accept the award and pay the penalty. But, while our Hague delegates were taking this high and very proper position, what was the attitude of our State Department? Not the theoretical attitude which may be expressed in words, but what was its real attitude as shown in actual practice? Our President says that deeds are mightier than words; and by the deeds of the State Department, rather than by the words of our Hague delegates, will the real policy of our Government be known. Whether there are any other deeds like the one which will now be discussed is unknown to the writer; but certainly this one looks very much like the repudiation of an international award.

The case in point is that of the Orinoco Steamship Company, which submitted through our State Department a claim against Venezuela for $1,401,559.03, and was awarded by international arbitration $28,224.93, or about two per cent. of its claim. This claim was presented about the time that England, Germany and Italy blockaded the ports of Venezuela in order to force a settlement of their claims. Through the kind offices of our Minister, Mr. Herbert W. Bowen, it was agreed to submit these claims to international arbitration. At the same time, Mr. Bowen arranged that non-blockading Powers having claims against Venezuela should also submit them to arbitration, among these being the

claim of the Orinoco Steamship Company. Later, the question came up as to whether the claims of the blockading Powers were to receive preference in time of payment, and the Hague Tribunal, to which the matter was referred, decided in their favor. Venezuela has just finished paying off the claims of the blockading Powers, and, as far as known, not one of those nations demanded the reopening of a case decided by the duly appointed arbitrator. That course was apparently left to the United States, one of the non-blockading Powers, a nation supposed to be friendly to weaker nations, especially to those of South America which the Monroe Doctrine has kindly committed to her care.

The claim of the Orinoco Steamship Company, also known as the Olcott claim, was decided by Dr. Harry Barge, an arbitrator appointed by the Queen of Holland, and one would naturally suppose that his decision would be regarded as final. The award (two per cent. of the original claim*) was of course unsatisfactory to the claimant, which, through the State Department,

* In this connection, the following quotations from an article on "The Calvo and Drago Doctrines," by Amos S. Hershey, which appeared in the January, 1907, number of the "American Journal of International Law," are interesting:

"The Civil War claims of Great Britain against the United States, which were settled by a mixed commission in 1873, amounted (with interest) to about $96,000,000. Less than $2,000,000 [2 per cent.] were actually awarded to the British claimants. . . . The claims of France growing out of the Civil War were also settled by the mixed commission which met in 1880–84. They aggregated about $35,000,000. The amount actually awarded was $625,566.35, *i. e.*, less than 2 per cent. of the amount demanded. . . . The claims of the United States against Mexico, presented to the mixed commission which met in July, 1869, and continued until January, 1876, amounted to the enormous sum of $470,000,000. The actual amount awarded was $4,000,000, or less than one per cent. The claims of citizens of Mexico against the United States amounted to $86,000,000. They received $150,000.

"The mixed commissions which adjudicated the claims against Venezuela at Caracas, during the summer of 1903, awarded 2,313,711 bolivars to claimants of the United States, out of 81,410,952 which were demanded; 1,974,818 to Spanish claimants who had demanded 5,307,626; 2,975,906 to Italian claimants who had asked for 39,844,258; 2,091,908 to German claimants who had demanded 7,376,685; 9,401,267 to British claimants instead of 14,743,572 as demanded; and 10,898,643 to Belgian claimants who had only demanded 14,921,805 bolivars. The demands of French claimants, which amounted to nearly $8,000,000, were cut down to $685,000.

"Besides being excessive in amount, it is believed that many of these claims are bottomed on fraud and tainted with illegality and injustice. It is notorious that the sums received by a government are often far below the face value of the loan, and many of the claimants for losses during civil war or insurrection are not above a well-grounded suspicion of having themselves been engaged in unneutral or insurrectionary acts."

sought a reopening of the case. This action was so effective that, under date of January 30th, 1905, Mr. Bowen, in a letter to the Venezuelan Minister of Foreign Affairs, referred to this claim as follows:

"I have the honor, in compliance with instructions I have received from Washington, to request your Excellency to inform me whether the Government of Venezuela is willing to agree to the revision of the Olcott matter?"

Under date of February 2nd, 1905, the Minister of Foreign Affairs replied to Mr. Bowen on this point, as follows:

"As to the revision of the award of Mr. Olcott, although it is not known that any protest about the matter has been made by him, the case, in the opinion of the Federal Executive, would be of such gravity if it were made that in his judgment all the protocols would be annulled which your Excellency signed in Washington in the name and as the representative of Venezuela. Nothing creditable would then result to the Government of the Republic from its acceptance."

Under date of March 10th, 1905, Secretary Hay wrote to Mr. Bowen:

"The revision of the Olcott award could not have the serious consequence supposed in the note of the Minister addressed to you on February 2nd. The protocol for the revision of that award would be so drawn that the action of the reviewing tribunal would have no effect on the previous protocol and awards. It would have the effect, and this Department asks, that the tribunal might fairly and fully reconsider the whole case, and render to Mr. Olcott that justice which appears to have been denied by the award given under the previous protocol."

In the first part of this letter, Mr. Hay urged the necessity of arbitrating the New York & Bermudez Co. claim, then pending in the Venezuelan Courts, and referring to both those matters, he closes his letter in the following rather emphatic language:

"The attitude of the Venezuelan Government toward the Government of the United States, and toward the interests of its citizens who have suffered so grave and frequent wrongs arbitrarily committed by the Government of Venezuela, require that justice should now be fully done, once for all. If the Government of Venezuela finally declines to consent to an impartial arbitration, insuring the rendition of complete justice of those injured parties, the Government of the United States may be regretfully compelled to take such measures as it may find necessary to effect complete redress without resort to arbitration. The Government of the United States stands committed to the principle of im-

partial arbitration, which can do injustice to nobody; and, if its moderate request is peremptorily refused, it will be at liberty to consider, if it is compelled to resort to more vigorous measures, whether those measures shall include complete indemnification, not only for the citizens aggrieved, but for any expenses of the Government of the United States which may attend their execution.

"You are at liberty to furnish a copy of this instruction to the Minister of Foreign Affairs."

Now, this letter reads very much like an ultimatum; and, while it states that the "United States stands committed to the principle of impartial arbitration," it also demands that the decision of an international arbitrator be annulled, because Mr. Olcott "appeared to have been denied" justice. That a broad-minded man like Mr. Hay could have written such a letter it is difficult to understand; but it must be remembered that this was written when he was very ill, just a few days before leaving on that vacation which preceded his death. During that illness, matters concerning the less important nations may have been left to subordinates, whose breadth of view may not have been as great as his own.

This letter was presented to the Minister of Foreign Affairs on March 19th, 1905, and on March 23rd the following reply was made:

"I limit myself to acknowledging the receipt of your Excellency's note of the 19th instant, and of the enclosure of his Excellency Mr. John Hay, of the 10th, because I believe, with good foundation, that the Venezuelan Government has in reality no pending questions with the Government of the United States, it being an evident fact, supported by every kind of evidence, that the Venezuelan Government arranged in Washington, by its protocols signed in 1903, the subjects that could be matters for discussion and that were decided by the mixed commission that afterward met in Caracas. As, on the other hand, one of the matters which is treated by his Excellency Mr. Hay is found contained in those decisions, which is the same as if we should say that it has already the potency of things adjudicated, and because the Venezuelan Government would consider it an offence to the honor of the Dutch umpire, Mr. Harry Barge, who decided the Olcott claim, acquiescence could not be given to such an unseasonable request without failing in the respect which is due to that which has been agreed upon, and it would be at the same time even a reason for believing that not even a new agreement, judgment or arbitration could be executed. So with the matter of the New York and Bermudez Company, his Excellency Mr. Hay ought to know that, by its nature, it is one of the cases that belong to the ordinary courts of the country, to which the laws now existing

remit the case, and to which are subject all those of foreign nationality who come to reside or make contracts here. The provisional President of the Republic charges me, then, to say to your Excellency, in order that you may in turn communicate it to his Excellency Mr. John Hay, that this Government, in order to consider his note, needs to know at once and for the aforesaid reasons whether the matter in question relates to the sovereignty and independence of this Republic—that is to say, whether or not the Government of the United States respects and reveres the legislation of this Republic and the nobility of its tribunals, and whether it respects and reveres equally the agreements and arbitral decision which it, representing the Venezuelan Government, concluded."

These two letters deserve careful reading, for they well illustrate the attitude of each nation, not only on this particular point, but on other questions at issue. Venezuela's reply to the ultimatum evidently staggered the State Department, for the sending of war-vessels or complete silence was the only course left for the United States in such a situation. Whether Congress and the country at large would consider war-vessels justified when the facts were known was a question which no doubt the proper officials carefully considered. At any rate, the policy of complete silence was adopted, and it was two years before the Olcott claim again became a matter of diplomatic correspondence. On February 28th, 1907, Secretary Root wrote to our Minister, Mr. William W. Russell, a letter pressing five claims against Venezuela, of which one was the Orinoco Steamship Company claim. The argument submitted by Mr. Root for the reopening of this claim to arbitration was the able and exhaustive brief of a lawyer for his client, but it is too long to quote in full, as it would cover eight pages of the REVIEW. The extracts given here will show the line of argument:

"What the claimant now asks is the reëxamination of this award by a competent and impartial tribunal. To this reasonable request, that the case of the Orinoco Steamship Company be reopened, and that the case be submitted in its entirety to an impartial and international reëxamination, the Government of Venezuela presents as an objection the fact that this decision of the American-Venezuelan mixed commission on claims is final, and that to reconsider the decision of an arbitrating court would be equivalent to ignoring the force of such decision.

"To this there is an obvious and very reasonable reply, to wit: That a decree of an arbitrating court is only final when the court proceeds within the terms of the protocol which established the jurisdiction of the court, and that when such terms are ignored the decision is necessarily deprived of the right of final force. In this individual case,

the protocol specifically said that 'the Commissioners, or in case they should not agree, the Arbitrator, shall decide all the claims upon a basis of absolute equity, without paying attention to objections of a technical character nor to the provisions of the local legislation.'

"The equity alluded to is clearly not the local equity, that is, not necessarily the equity of the United States nor the equity of Venezuela, but the spirit of justice applied to a particular question without attention to local statutes, regulations or interpretations. . . . It is difficult to see how the arbitrator could have more clearly ignored the most common principles of justice and equity. . . . The award of the arbitrator, therefore, which ignored these simple yet essential considerations, is in every respect unacceptable. He assumed, it is true, the jurisdiction; but the error which he made is so serious and evident that this Government cannot ask its fellow citizens to accept this award as final.

"Although the attention of Venezuela has been called several times to these arguments, and it has been courteously and trustingly requested to submit the case of the claimant in its entirety to reëxamination by a competent and impartial tribunal, the Venezuelan Government has briefly objected that the awards of the Commissioners, and in case that they should not agree, 'those of the Arbitrators, shall be final and conclusive.' At the very same time, and almost at the very moment that Venezuela declared the final force of the awards of the Commission, it was engaged in protesting against the Belgian and Mexican awards, although the protocols in conformity with which these two commissions were established stipulated that 'the decisions of the Commissioners, and in case they should not agree, those of the Arbitrators, shall be final and conclusive.' To a disinterested party it would seem, therefore, that the awards in favor of Venezuela are final and conclusive, but that awards adverse to her are not final nor absolutely conclusive. In this conflict between theory and practice this Government naturally invokes the practice of Venezuela. . . .

"In view, therefore, of the circumstances of the case and of the express violations of the terms of the protocols, or of errors in the final award arising from serious errors of law and of fact, and in the light of the history of both nations in the matter of arbitral awards, this Government insists upon the reopening and resubmission of the entire case of the Orinoco Steamship Company to an impartial and competent tribunal and confidently expects them."

Evidently, Venezuela did not see the advantage of submitting three new claims to arbitration coupled with a request for the re-arbitration of an old claim already decided. It looked very much as if arbitration would be final only when the award was satisfactory to the United States. At any rate, under date of April 6th, 1907, the Minister of Foreign Affairs replied through Mr. Russell, in part, as follows:

"Regarding the three other cases, called 'Jaurett,' 'Orinoco Steam-

ship Company' and 'New York and Bermudez Company'—and to which might apply the statement contained in your Excellency's note, that they were reëxamined by the Government of the United States, who devoted considerable time to them in order to present them, as is done now, under a new and fuller light—I must call your Excellency's attention to the fact, most worthy of being taken into consideration, that these same three claims were the subject, towards the end of the year 1904 and until the month of March of the year 1905, of active negotiations on the part of your Excellency's predecessor, his Excellency Mr. Herbert W. Bowen, the Government of Venezuela having maintained such decisions as it considered accorded with the protective principles of the sovereignty and independence of the Courts of Justice of the Republic, with its rights as a nation and with the strict observance of international covenants which were created by Mixed Commissions whose decisions, it was agreed, should be final and unappealable. The aforesaid diplomatic discussion ceased since the 23rd of March, 1905, on which date this Ministry replied to the note dated on the 19th of said month of the same year written by your Excellency's predecessor, his Excellency Mr. Herbert W. Bowen, which was accompanied by a copy of the instructions sent by his Excellency Mr. John Hay, then Secretary of State of your Excellency's Government.

"Since the aforesaid date, March 23rd, 1905, my Government had received no intimation from your Excellency's Government that it was its intention to insist upon the same claims which are now included in the enclosure accompanying your Excellency's note; for which reason it considered very properly that the diplomatic discussion about the same was closed.

"On their being again submitted by the Government of the United States, as your Excellency says, under a new and fuller light, my Government purposes to carefully consider the new phase of the three claims above mentioned."

Under date of April 23rd, 1907, the Minister of Foreign Affairs replied at greater length on all five claims, and, referring to the Olcott claim (third point) he states:

"Regarding the second, third and fourth points, the Government of the United States is well aware that the questions involved in them have become '*choses jugées*,' and that the revision which is proposed in memorandum of the awards of the Venezuelan-American Mixed Commission in two of these matters, although it would finally be favorable to Venezuela, in view of the right which is on her side, it could not then be explained why there should not be a revision of all the awards of the Mixed Commission whereby Venezuela was sentenced contrary to her right which she maintained on various questions."

These replies of April 6th and 23rd were evidently not satisfactory to our State Department; for, under dates of July 9th

and August 13th, 1907, Minister Russell requested that Venezuela give further and more careful consideration to the five questions brought up in Secretary Root's note of February 28th. To these requests Venezuela replied under dates of August 13th and 20th, maintaining her former position, and submitting arguments in greater detail. This ended, for a time at least, further diplomatic discussion on the five points at issue; but the claim of the Orinoco Steamship Company was again brought forward by the payment of the first instalment to the non-blockading Powers. In August, 1907, Venezuela, having paid off the claims of the blockading Powers, began to pay off the claims of the non-blockading Powers, allotting to each nation its proper percentage as determined by the various international arbitrators. Venezuela had protested against the Belgian and Mexican awards, on the ground that they were excessive and contrary to the spirit of equity and justice. Finding, however, that her protests were unavailing and that these two nations were unwilling to reopen the cases, Venezuela decided to make the best of a bad bargain, live up to her agreement and accept the decision of the arbitrators as final.

The attitude of the United States is shown in Minister Russell's note to the Venezuelan Minister of Foreign Affairs dated September 20th, 1907, in part as follows:

"Referring to my communication of the 16th inst., I have the honor to inform your Excellency that I have collected from the Bank of Venezuela the sum of Bs. 33,771.10, a payment for the month of August, 1907, on account of the sum due the United States under the awards of the Mixed Commission of 1903.

"In accepting this first instalment of the awards of the Mixed Commission of 1903, my Government instructs me to say that it insists upon a revision of the award in the case of the Orinoco Steamship Company, and that, pending final settlement of this question, no portion of any moneys which may be paid by Venezuela will be considered as paid on account of or applicable to that award."

The following day, September 21st, the Minister of Foreign Affairs replied to Mr. Russell in part as follows:

"The Venezuelan Government is not concerned with the manner in which the amounts already received, and to be received, are applied by your Government, after they have been formally received and in the possession of your Excellency's Government. For the Government of Venezuela, it is sufficient, for the discharge of its liabilities, to pay to

your Government the amounts awarded by the Venezuelan-American Mixed Commission, in order to comply with the terms of the protocols signed in Washington the 17th of February, 1903, and in conformity with the final judgment of the Hague Tribunal of the 22nd of February, 1903, ordering the Government of Venezuela to make the payments under the awards of the Mixed Commissions of 1903, to the non-blockading nations, after the claims of Germany, England and Italy had been paid.

"Your Excellency's receipt for the sum already mentioned is the proof that the Government of Venezuela, on its part, has complied with its obligation to distribute among the creditor nations, under all of the awards of the Mixed Commission, the monthly instalment to which the 30 per cent. of the entrances of the custom-houses of LaGuayra and Puerto Cabello amount, in the proportions that must be observed among the sums which compose the awards in favor of each, and in relation with the total amount of the awards of the several Commissions. . . .

"Your Excellency informs me that your Government insists on a revision of the award in the case of the 'Orinoco Steamship Company,' and considers as pending the definitive settlement of this question. . . .

"The Government of Venezuela thinks it proper, observing the insistence of your Government in this matter, to call the attention of your honorable Government to the context of the two notes of 24th and 26th of March, 1903, which his Excellency Mr. John Hay, then Secretary of State, addressed to his Excellency Señor don Rafael S. Lopez, Minister of Salvador, in reply to the memorandum of the said Minister, in which he solicited revision, or reconsideration, of the award given by Sir Henry Strong, and the Honorable Mr. Dickinson, in the case of the 'Salvador Commercial Company' and others against the Salvador Government.

"The said notes are as follows: 'Department of State, March 24th, 1903.—The undersigned, Secretary of State, has the honor to inform the Minister of Salvador, after due consideration of the Minister's memorandum of March 4th, 1903, that the Government of the United States finds therein no reason for altering the opinion heretofore expressed, that it has no power to revise or reopen the award made in the case of the "Salvador Commercial Company" *et al.* against the Government of Salvador. A failure to comply with the award would, moreover, involve a grave discourtesy to the eminent arbitrators who sat in this case, and a serious injury to the cause of arbitration.

"'The Government of the United States therefore expects compliance by the Government of Salvador with the terms of the Protocol of arbitration signed by her Executive and ratified by the National Assembly.

"'[Sgd.] JOHN HAY.'

"'Department of State, March 26th, 1903.—I have the honor to acknowledge the receipt of your note of the 24th inst., which has received consideration.

"'The Department does not consider the principles and authorities which you invoke in support of your contention that the award made by the Arbitrators, in the case of the "Salvador Commercial Company"

et al. against the Government of Salvador is illegal and void, as in any wise applicable to the case. I perceive no ground to change the views expressed in my note of the 24th inst. As indicated in that note, this Government expects the Salvador Government to comply with the terms of the Protocol of arbitration. [Sgd.] JOHN HAY.'

"These laconic and final replies of his Excellency Mr. Hay, refusing absolutely to revise the Strong-Dickinson award, are presented to your Government by the Government of Venezuela, with all the authority they represent, bearing, as they do, the signature of the eminent statesman, who, by a strange coincidence, also signed the Protocol of February 17th, 1903, by which were submitted the claims of the Orinoco Steamship Co. and the Manoa Company, Limited, to the Commissioners, and in the case of their disagreement to an umpire to be selected by the Queen of Holland, stipulating that those awards would be definite and conclusive."

The reply of our State Department to this last note of Venezuela is awaited with a great deal of interest. While the Hague Conference decided that coercive measures, implying the use of military or naval forces, could be used if "the decision of the arbitrators is not fulfilled by the debtor nation," it provides no plan for dealing with a debtor nation which refuses a reopening but which fulfils the decision. Neither does it provide a plan for compelling a creditor nation to fulfil the decision. Apparently our Government must now send war-vessels and compel a reopening, or else it must drop the matter, after pursuing a policy which has done much to counteract the good effect of Secretary Root's recent visit to South America.

These quotations from official documents are more lengthy than is customary in an article of this kind; but, owing to conflicting statements in the press of the relations between the two nations, fairness to each demands that the public should have the privilege of reading the exact correspondence and judging accordingly. Careful reading undoubtedly indicates that our Government has refused to abide by the decision of an international arbitrator, and has practically gone to the point of ultimatums to force a reopening. Would such a course have been pursued against a stronger nation, and is our State Department justified in its action? It must be remembered that our Secretary of State, by virtue of his office, is to a certain extent the attorney of every American claimant, and should use every reasonable effort in his behalf. But is there not a point where he should cease to be the attorney and become

the statesman? No doubt great pressure is brought to bear upon our State Department by the claimant and his friends; but, when our Government has brought about an international arbitration, it would seem that its duty between the claimant and the foreign nation has been fulfilled. By refusing to accept the award merely because the arbitrator's view of equity and justice are different from those of the claimant, or different from even those of the Secretary of State, our Government takes a position unworthy of a great nation. If an award be manifestly unjust, the evidence could be referred to Congress for investigation, and, if necessary, money appropriated to satisfy the claimant. Surely such a course is far better than discrediting international arbitration, as has been done in the case now under consideration.

It is quite true that the present system of international arbitration is unsatisfactory, that very often the arbitrator is chosen for personal or political reasons, and has little experience in the proceedings of international law. But each nation suffers equally, as witness Venezuela's contention that the awards against her in the Belgian and Mexican claims were excessive. While the arbitrator may not rank in experience and ability with the foremost judges of his nation, his decisions should nevertheless be respected unless fraud is proven, or unless, through friendly presentations, the injustice of the award is apparent to both nations, and a reopening is mutually agreeable. Instances in both these classes have occurred with our own Government. Apparently the only case which was reopened because the international arbitrator was proven corrupt was the controversy between Venezuela and the United States leading up to the appointment of the Commission of 1866. Venezuela protested against the awards, alleging that there was a conspiracy between the arbitrator, the American Minister and his brother-in-law, to collect a large percentage from the successful claimants. This charge was confirmed by Congressional investigation, and the claims were sent to a new commission. In two cases between Hayti and the United States, Hayti complained of the injustice of the awards, and the cases were reopened after Mr. Bayard, then Secretary of State, had satisfied himself that Hayti's protest was well founded. In the Salvador case cited in Venezuela's note of September 21st, 1907, Secretary Hay evidently considered that the protest was not well founded, and his action was con-

clusive. When Belgium and Mexico refused to open the Venezuela awards their action was conclusive, for the cases had already been decided by the Court of Last Resort—International Arbitration.

At best, International Arbitration cannot be regarded as a perfect solution for the controversies between nations, any more than our courts afford a perfect solution for the controversies between individuals. Both are means of keeping the peace; and, although the decision is seldom satisfactory to the losing party, stability of government is insured and the people at large benefited, even though the individual may suffer. The decisions of our Supreme Court are often criticised; and sometimes in the most important cases, such as the income tax and Northern Securities, the Court is divided by five to four. And yet no one questions the ability and good faith of these judges, even though they may not agree among themselves as to the application of the principles of law, equity or justice. Such a celebrated international award as that of the "Alabama" claims had its critics; and a most exhaustive review of a noted English authority showed that the decision was contrary to the principles of international law. There are many intelligent Canadians who believe that in the Alaska boundary dispute the interests of Canada were deliberately sacrificed by the Chief Justice of England for the larger interests of the Empire. And yet England in the one case and Canada in the other accepted the award and made the best of it. Even Venezuela, although protesting against the Belgian and Mexican awards, is, nevertheless, paying them, thus setting an example which the United States might well follow.

No doubt, one of these days there will be established at The Hague, as advocated by our delegates, a permanent Court of Appeals, drawn from the best judicial talent of every nation—a tribunal which will command the respect and obedience of all nations. Meanwhile, unless fraud is alleged, the United States should set the example of abiding by the decision of international arbitration as at present constituted, no matter how crude the system, and find some other way of dealing with a claimant who is dissatisfied with an award than sending ultimatums to weaker nations. Otherwise, the impression will soon prevail that international arbitration is final only when the award is satisfactory to the stronger nation.

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